KANAGASAVEY A/L SINAYAH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
TUAN JEFFREY TAN JC
[CRIMINAL APPEAL NO. 42-404-93]
26 JANUARY 1995

***CRIMINAL LAW**: Seizure of property under Dangerous Drugs (Forfeiture of Property) Act 1988 - Whether release of detainee under writ of habeas corpus prevents forfeiture - Whether released detainee ceases to be a liable person - ss. 7 & 32(2) Dangerous Drugs (Forfeiture of Property) Act 1988.*

***EVIDENCE**: Burden of proof - Effect of notice to show cause - Presumption that person proceeded against is liable person and property is illegal - Shifting of onus to person proceeded against to show cause to contrary - ss. 8, 9(1) & 35 Dangerous Drugs (Forfeiture of Property) Act 1988.*

***STATUTORY INTERPRETATION**: Maxim of "optima est lex quae minimum relinquit arbitrio judicis" - Act to be purposively construed without regard to ambiguities, infirmities of language or trivial objections - s. 34 Dangerous Drugs (Forfeiture of Property) Act 1988.*

The appellant was detained under the Dangerous Drugs (Special Preventive Measures) Act 1988 on 16 May 1990. The sum of RM7,500 held in two bank accounts of the appellant was seized by the respondent on 17 May 1990. The appellant claimed the said property by letter dated 7 August 1990. On 10 October 1990, the appellant was set free by a writ of *habeas corpus.*

The Sessions Court heard the appellant's claim to the seized property under s.35(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 (the Act) and decided in favour of the respondent on 11 December 1993 and held that the appellant had failed to rebut the presumptions under s. 35 of the Act. The appellant appealed to the High Court on the ground that the appellant ceased to be a liable person when he was set free by the writ of *habeas corpus.* The appellant argued that his release by *habeas corpus* renders his detention *void ab initio* and unlawful and excludes him as a liable person under the Act. He also argued that the words "is or was detained" in s. 7(1)(a)(ii) means lawful detention if narrowly construed in his favour.

Held:

[1] The maxim "*optima est lex quae minimum relinquit arbitrio judicis*" i.e. the best law leaves least to the discretion of a Judge is provided in s. 34 of the Act. By this provision, the Act shall be construed and interpreted to give effect to the purpose of the Act.

[2] The purpose, *inter alia*, of the Act is to seize and forfeit movable and immovable property connected with drug activities and one method is seizure by the Public Prosecutor under ss. 25, 27 & 28 and automatic forfeiture unless a claim is lodged within three (3) months of the date of seizure under s. 32(2) upon which the Session Court disposes of the claim.

[3] The application under s. 32 of the Act (adopting procedural requirements similar to s. 8 is provable; not proved or disproved according to the law of evidence in criminal proceedings. However s. 35 of the Act makes a subtle twist to the burden on the prosecution and enacts a presumption that the person proceeded against is a liable person and property

is illegal in favour of the prosecution. The prosecution, therefore, discharges its onus by filing affidavits complying with s. 8 and the onus shifts to the appellant to show cause to the contrary by admissable evidence.

[4] Even though a person released by writ of *habeas corpus* is not a person lawfully detained, the appellant is still a liable person under s. 7(1)(a)(ii). The inclusion of the word "lawful" would shade it differently and exclude a person detained but released by a judicial order, identified in s. 7 as a liable person. To interpret otherwise would be to go against clear and unambigious provision of the Act and would be a judicial interpretation against the purpose of the Act. By reason of s. 34 of the Act, the Court has very little discretion to rely on its own interpretation.

[Appeal dismissed].

Cases referred to:
Tang Kheng Teong & Anor v. PP [1992] 2 CLJ 1273 ***(foll)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
Valliamai v. PP [1962] 28 MLJ 280 ***(refd)***
Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384 ***(refd)***
PP v. Tanggaah (No. 2) [1972] 1 MLJ 223 ***(refd)***
Ramlee & Anor v. PP [1969] 1 MLJ 42 ***(refd)***

Legislation referred to:
Criminal Procedure Code, chapter XL s. 404(1)
Dangerous Drugs Act 1952
Dangerous Drugs (Forfeiture of Property) Act 1988 ss. 5, 7(1)(a)(ii), 8, 9(1), 14, 25, 27, 28, 34, 32(1),(2), (3) & 35(2)
Dangerous Drugs (Special Preventive Measures) Act 1988

For the appellant - V.K. Dasaratharaj; M/s. Karpal Singh & Co.
For the respondent - Shahidani b. Abdul Aziz, DPP

JUDGMENT

Y.A. Jeffrey Tan:

The sum of RM7,500 held in 2 banking accounts of the appellant was seized by the respondent under the Dangerous Drugs (Forfeiture of Property) Act 1988 (the Act). The appellant claimed the property, and under s. 32(2) of the Act the respondent then referred the claim to the Sessions Court for its decision, which the appellant appeals from.

In the proceedings below, it was held that the appellant had failed to rebut the presumption under s. 35 of the Act and the property seized was accordingly ordered to be forfeited.

There are 4 grounds in the petition of appeal but all were abandoned save for the following issue:

> whether the appellant ceases to be a liable person under s. 7 of the Act when he was set free by a writ of habeas corpus.

That issue will be answered at the end of this judgment, but a dearth of authorities on the mechanism of the Dangerous Drugs (Forfeiture of Property) Act 1988 prompted a little more to be said than is absolutely necessary for the instant appeal.

The record of appeal discloses the following:

(i) the appellant was detained under the Dangerous Drugs (Special Preventive Measures) Act 1988 on 16 May 1990, but was set free by a writ of *habeas corpus* on 10 October 1990.

(ii) the property was seized on 17 May 1990, and the appellant's claim was made by letter dated 7 August 1990, and

(iii) the Sessions Court delivered its decision on 11 December 1993.

The appellant contends that his release from detention by a writ of *habeas corpus ipso facto* renders his detention *void ab initio,* evinces his detention as unlawful and not in accordance with law, and excludes him as a liable person under the Act. The appellant further contends that the words "is or was detained" in s. 7(1)(a)(ii) enjoins a lawful detention, and as the provisions for seizure are penal, s. 7(1)(ii) must be narrowly constructed in his favour. In effect the appellant invites the word "lawful" to be read to s. 7.

It is said *optima est lex quae minimum relinquit arbitrio judicis* the best law leaves least to the discretion of a Judge, a law so clearly expressed and well defined as to leave the judge little room for the exercise of his own judgment or opinion; the rights and duties thereby created may at once be discerned, and the Judge is approved who adheres to the terms of the law he is administering and relies as little as possible on his own views of its interpretation, meaning or intention.

The truism in that maxim is reflected in s. 34 which reads:

> In any proceedings under this Act the provisions of this Act shall be construed and interpreted so as to give effect to the purposes of this Act without regard for ambiguities, or infirmities of language, or other defects or deficiencies therein, or to objections which are trivial in nature or which do not affect the merits or the substance of the issues before the Court.

The purpose *inter alia* of the Act is the seizure and forfeiture of movable and immovable property connected with activities related to drug offences under the Dangerous Drugs (Forfeiture of Property) Act 1988 and the Dangerous Drugs Act 1952, or any foreign law corresponding to those Acts, and accomplished by:

(i) orders of forfeiture by the High Court (see ss. 5 & 8); a Court convicting a person for an offence under ss. 3 or 4 of the Act, shall under s. 5 forfeit all property which is the subject of that offence or which has been used for the commission of that offence, and under s. 8 the Public Prosecutor has the liberty to apply to the High Court for the forfeiture of properties which the Public Prosecutor has reason to believe are illegal properties held by any person whom the Public Prosecutor has reason to believe is a liable person.

(ii) seizure and forfeiture without the institution of any proceedings for the prosecution for an offence under the Act without an application to Court (see s. 32(1)),

(iii) seizure by the Public Prosecutor of movable property, a business and immovable property (see ss. 25, 27 & 28), and its automatic forfeiture under s. 32(1) immediately upon the expiration of three months from the date of seizure, unless a claim is lodged within 3 months from the date of seizure in accordance with s. 32(2).

(iv) forfeiture on a decision of the Sessions Court after its disposal of a claim under s. 32(2) (see s. 32(3)).

The appellant's claim to the Sessions Court was undeniably a proceeding regulated by s. 35 of the Act which reads:

> Where any proceedings under this Act are brought against any person in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

The Act however is silent as to the procedure applicable to a reference to the Sessions Court under s. 32, although for applicatiosn to the High Court the procedure is specifically provided in s. 8.

This absence of an explicit procedure in s. 32 references was highlighted in *Tang Kheng Teong & Anor. v. PP* [1992] 2 CLJ 1273 where Vincent Ng JC (as he then was) held that procedural requirements similar to s. 8 should be adopted in s. 32 references.

References under s. 32 should take further cue from s. 14 which stipulates all proceedings under Part III of the Act shall be dealt with by the High Court in the exercise of its criminal jurisdiction and the law relating to criminal procedure in the High Court shall apply to such proceedings, subject to the modifications prescribed in Part III or regulations made under the Act.

Nonetheless, for that adoption of criminal procedure not to be perfunctory, an application under ss. 8 or 32, regulated by criminal procedure, is provable, not proved or disproved according to the law of evidence relating to criminal proceedings.

In criminal proceedings the burden is always on the prosecution to commence and furnish the required proof. However, in proceedings under the Act there is a subtle twist to that burden:

(a) notice to the person proceeded against to show cause is only issued after the Public Prosecutor has satisfied the Court that its application fulfills the requirements of s. 8.

(b) the issuance of a notice to show cause evinces the facts disclosed by the Public Prosecutor warrant a forfeiture of the property identified, unless otherwise rebutted.

(c) from the onset until the conclusion of proceedings under the Act (defined as any proceedings under the provisions of the Act) Courts must presume (i) the person proceeded against to be a liable person and (ii) the property to be illegal property, unless by admissible evidence the contrary is proved, and the person proceeded against is required to rebut those presumption on a balance of probabilities [see *PP v. Yuvaraj* [1969] 2 MLJ 89] in that (i) he is not a liable person under s. 7 or (ii) the property is not illegal property.

(d) unquestionably the presumptions give the Public Prosecutor more than just a head start, for without more it fulfills all proof required for a forfeiture order, and any further proof would be extraneous unless the Public Prosecutor intends to rebut any evidence adduced by the person proceeded against.

The corollary of the above is that the Public Prosecutor would have discharged the onus on him by filing the affidavits complying with s. 8, and at the inquiry the onus would be shifted to the person proceeded against to commence and show by admissible evidence a cause to the contrary. Any claimant who fails to furnish any proof or proof to the contrary would not have discharged the burden, and the property seized would be forfeited.

Upon receipt of notice, the person proceeded against is "to show cause why" in s. 9(1) and "prove to the contrary" in s. 35. Those two expressions, although worded quite differently are nevertheless not unlike for they are essentially "show cause proceedings" the character of which bears a remarkable similarity to the procedure on forfeiture of bonds in chapter XL of the Criminal Procedure Code.

Section 404(1) of the Criminal Procedure Code provides that the Court "may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid" enunciated in the following authorities.

In *Valliamai v. PP* [1962] 28 MLJ 280, Ong J (as he then was) said that forfeiture of a bond under s. 404(1) of the CPC is a question to be dealt with in two stages, first, has sufficient cause been shown against forfeiture, and secondly, if not, are the circumstances such that the whole sum of the penalty ought to be enforced.

This two-stage approach was similarly expressed in *Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384, where the Supreme Court pronouncing the meaning of "cause to the contrary" in s. 256(3) of the National Land Code said, "cause to the contrary" requires the Court to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved, and for a chargor to "shew cause" either in law or equity against an application for sale, and that the Court should refuse to make an order where it would be unjust to do so.

It was also held in *PP v. Tanggaah* (No. 2) [1972] 1 MLJ 223 that without notice to the bailor Courts act without jurisdiction and any forfeiture cannot stand.

In *Ramlee & Anor. v. PP* [1969] 1 MLJ 42 Abdul Hamid J (as he then was) had this to say:

> As regards the procedure I think the case of *Khor Ewe Suan & Anor. v. PP* [1964] MLJ 220 can be applied here. In that case a statement in Mallal's Criminal Procedure, 4th Edn. p. 577 was quoted with approval and the learned Judge (Hepworth J) held that:
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> > in this case the Court had not drawn up proceedings against the principal and the sureties under the section. It seems to me that evidence should have been led producing the actual bail bond and stating that the bailors were the persons who entered into the bond. They should have been given an opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should have been invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required.

Equivalent views that a person proceeded against has a right to cross-examine the deponents of affidavits was also voiced in *Tang Kheng Teong & Anor. v. PP* (*supra*).

Section 7 lists many categories of persons as "a liable person", but for the instant Appeal, the pertinent part reads as follows:

7(1) The following persons shall be liable to be proceeded against under this Part:

(a) every person -

(i) ...

(ii) who is or was detained after the commencement of this Act pursuant to any order of detention or restriction made under any law, in respect of any activity relating to or involving the trafficking in dangerous drug:

Provided that the activity forming the ground of detention took place after the commencement of this Act;

Released by a writ of *habeas corpus, ex facie* the appellant would not be "a person lawfully detained". However that is not synonymous as not being a liable person. Section 7 identifies the categories of persons liable to be proceeded against and the words "was detained" given its ordinary and prosaic meaning would rope in and embrace as a liable person:

(i) a person detained but released by the detaining authorities without him serving a term of detention or restriction, or,

(ii) a person detained but released by a judicial order, or,

(iii) a person detained but released after service of the full term (or part) of detention or restriction.

Provided that that person was detained or restricted after the commencement of the Act under any empowering written law in respect of any activity relating to or involving the trafficking in any dangerous drug.

Any reading or construction of s. 7(1)(a)(ii) with inclusion of "lawful" would shade it differently for it will exclude category (ii) above and give it a narrower meaning than the natural impact of the words understood in its ordinary and popular context.

The language in s. 34 is both clear and unambiguous in that in proceedings under the Act, the Act must be construed to give effect to its intent. While it cannot be said that judicial interpretation of the Act is prohibited, yet it "must be construed and interpreted so as to give effect to the purposes ..... without regard for ambiguities....." It is explicit that judicial interpretation or any other construction is excluded save as to give effect to the purposes of the Act.

Having identified a person liable to be proceeded against as one who is currently detained or who in the past was detained, the legality of detention as *de rigueur* would not only be judicial interpretation against the purpose of the Act, but also take into account the ambiguities or infirmities of language, or defect or deficiencies in s. 7(1)(a)(ii). That plainly is not allowed for the Act gives to the Courts administering its terms very little discretion to rely on its own interpretation.

The appeal is therefore dismissed.